Route 22 Auto Sales d/b/a Route 22 Toyota and Route 22 Automobiles d/b/a Route 22 Honda *and* Amalgamated Local 747. Case 22–CA–23835

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On November 24, 2000, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We find, contrary to the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Amalgamated Local 747 (Local 747).

The Respondent withdrew recognition from Local 747 in late August 1999, following an affiliation, merger, and disaffiliation involving the collective-bargaining representative of its unit employees. We begin by reviewing the relevant facts.

Starting in 1992, the Respondent recognized Local 747 as the exclusive representative of a unit of its employees at its facility in Hillside, New Jersey. Local 747 also represented bargaining units at other employers. Ed Bigham was the president of Local 747. In March of 1995, all but one unit of employees represented by Local 747, including the unit of the Respondent's employees, affiliated with the International Union of Allied, Novelty and Production Workers, AFL–CIO (Novelty Workers) and became chartered as the United Service Workers Union, Local 911. The unions understood that either the Novelty Workers or Local 747 could terminate the affiliation in the first 5 years. Bigham became the president of Local 911. In 1997, Local 911 merged with the Production Workers Union, Local 148 (Local 148), another local affiliated with the Novelty Workers. Bigham became the secretary-treasurer of Local 148. Following the merger, the Respondent recognized Local 148 as the employees' exclusive representative.

In the summer of 1998, Local 148 entered into contract negotiations with the Respondent. The parties did not reach a written agreement, though the Respondent agreed to implement a pay raise in September 1998 that had been agreed to despite the absence of a complete agreement.[1]

On or about April 19, 1999,[2] Bigham sent letters to employees of the shops which had been covered by contracts with Locals 911 and 747, including the Respondent's employees. The letter stated, in part, that on a specified date, "a vote will be taken to disaffiliate with the [Novelty Workers], Local 148 and be known as Local 747." On May 6, the Respondent's unit employees voted unanimously to disaffiliate from Local 148.[3] On May 12, Bigham presented to the Respondent's president a letter dated May 11 informing him, in part, that "the former members of Local 747 have voted to disaffiliate with the [Novelty Workers], Local 148, AFL–CIO. Therefore the membership will revert back to Amalgamated Local 747." The letter further instructed the Respondent to remit dues and send correspondence to Local 747.

The Respondent did not contemporaneously contest the disaffiliation process or the result of the vote. To the contrary, after consulting with counsel, the Respondent's president agreed to recognize Local 747 as the unit employees' exclusive representative and signed a collective-bargaining agreement with Local 747 on May 12.[4] That collective-bargaining agreement expires July 31, 2002.

Under pressure from Local 148, on or after August 27, the Respondent withdrew recognition from Local 747 and resumed its recognition of Local 148 as the employees' exclusive representative. In January 2000, the Respondent executed a collective-bargaining agreement with Local 148.

The instant charge was filed on February 16, 2000. It alleged that the late August withdrawal of recognition from Local 747 was unlawful.[5] Thus, the charge was filed less than 6 months after the Respondent withdrew recognition from Local 747 and recognized Local 148.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) by withdrawing recognition from Local 747. With respect to the May 6, 1999 disaffiliation, the judge found that "the evidence is not particularly clear that the employees, even if they voted to disaffiliate from Local 148, also voted to affiliate with Local

[1] Contrary to what the judge found, the record does not establish that the parties reached a complete agreement or implemented all of the terms and conditions of any such agreement. The record indicates only that the Respondent put into effect the pay raise that had been agreed to.

[2] All subsequent dates are in 1999, unless noted otherwise.

[3] The judge characterizes the vote on May 6 as a disaffiliation. No exceptions were filed to this characterization. Thus, we will refer to it as a disaffiliation.

[4] We correct an inadvertent error in paragraph 9 of the complaint, repeated in the introductory paragraph of the judge's decision, regarding the date on which the Respondent recognized and signed a contract with Local 747. The date is May 12, 1999, not May 12, 2000. As the instant charge was filed on February 16, 2000, and as the record establishes that the Respondent recognized and signed a contract with Local 747 on May 12, 1999, the references to May 12, 2000, are clearly erroneous. We also correct the judge's inadvertent misstatement of the date on which the complaint alleges that the Respondent withdrew recognition from Local 747. The correct date, set forth in the complaint, is August 27, 1999.

[5] Neither the charge nor the complaint alleged that the Respondent violated the Act by recognizing Local 148.

747" and that he did "not conclude that a vote to disaffiliate from Local 148 automatically constituted a vote to affiliate with Local 747." Based on these determinations, the judge treated the claim for recognition by Local 747 as a claim by a rival union and found that Local 747's claim could not defeat that of Local 148. The judge further found that there was a "substantial question as to whether the Complaint, or more particularly the remedy sought, can succeed because of the procedural failure to put on sufficient notice a necessary party to this proceeding, namely Local 148." The judge concluded that "given the fact that we have here two competing claims for representation, I think that the matter should properly be resolved through the Board's election process." Accordingly, the judge dismissed the complaint.

The General Counsel excepts to the judge's reliance on evidence outside the 10(b) limitations period—that is, the circumstances surrounding the May 6 disaffiliation—to conclude that the Respondent did not violate the Act by withdrawing recognition from Local 747. We find merit in the General Counsel's exception.

Section 10(b) of the Act "confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge. . . ." *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975). The Board has held, in light of the Supreme Court's decision in *Local Lodge No. 1424, IAM, AFL–CIO (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), that a respondent may not defend against a refusal-to-bargain allegation on the ground that the underlying original recognition of the union was unlawful, if it occurred more than 6 months before charges had been filed in the proceeding raising the issue. See *North Bros. Ford*, supra. Any such defense is barred by Section 10(b), which, as the Court explained in *Bryan*, was specifically intended by Congress to stabilize bargaining relationships. 362 U.S. at 419. The Board has similarly applied this rationale to preclude the untimely attack on the validity of a merger or affiliation process. *R.P.C. Inc.*, 311 NLRB 232 (1993).

In this case, the Respondent recognized and signed a contract with Local 747 in May 1999. That event was not attacked within 6 months by any charge. Accordingly, the recognition and contract cannot be assailed as unlawful.[6] Moreover, once the Respondent and Local 747 entered into a collective-bargaining agreement on May 12, Local 747 enjoyed a conclusive presumption of majority status for the first 3 years of that contract. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996). The Respondent was not privileged to withdraw recognition from Local 747. *R.P.C. Inc.*, supra. Thus, we agree with the General Counsel that the judge erred in finding that Local 148 presented a valid competing claim for representation that should be resolved by an election.[7]

For these reasons, we find that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from Local 747 during the term of the collective-bargaining agreement. Accordingly, we will order the Respondent to take the remedial action ordered below.[8] We will substitute the attached Order for that of the judge.

ORDER

The National Labor Relations Board orders that the Respondent, Route 22 Auto Sales d/b/a Route 22 Toyota and Route 22 Automobiles d/b/a Route 22 Honda, Hillside, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Amalgamated Local 747 as the exclusive bargaining representative of its employees in the following appropriate unit:

> All mechanics and mechanics helpers, all parts department employees, lubricators, body men, washers/polishers, car jockeys, porters, tiremen, undercoaters, used car get ready and partsmen, and all lot men employed by Respondent at its Hillside, New Jersey facility, BUT EXCLUDING part time employees, summer help, new and used car salesmen, service writers, office/clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

(b) Refusing to honor the terms of the collective-bargaining agreement reached with Amalgamated Local 747 on May 12, 1999.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain collectively with Amalgamated Local 747 as the exclusive representative of all the employees in the appropriate unit and honor the terms of the collective-bargaining agreement reached with them on May 12, 1999.

(b) Make employees whole for any loss of earnings and other benefits ensuing from its unlawful failure to

[6] Thus, we do not pass on whether the vote of May 6 was not only a vote to disaffiliate from Local 148 but also a vote to affiliate with Local 747.

[7] Accordingly, we disavow the judge's findings that the complaint and/or remedy could not succeed because of "the procedural failure to put on sufficient notice a necessary party to this proceeding, namely Local 148." There is no finding herein that Local 148 was charged with committing, or was found to have committed, an unfair labor practice, and no finding that the Respondent's recognition of Local 148 was unlawful. In any event, although not a party to these proceedings, Local 148 made an appearance on the record and stated its position on the issue, but filed no motion to intervene.

[8] The interest on any payments ordered pursuant to the remedy in this decision shall be calculated as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

recognize Amalgamated Local 747 and adhere to the collective-bargaining agreement.

(c) Pay to Amalgamated Local 747 dues which should have been, but were not, deducted from employees' paychecks pursuant to valid dues-checkoff authorizations until the expiration of the May 12, 1999-July 31, 2002, collective-bargaining agreement, with interest as prescribed in this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(e) Within 14 days after service by the Region, post at its Hillside, New Jersey facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or removed its presence from the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 27, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with Amalgamated Local 747 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All mechanics and mechanics helpers, all parts department employees, lubricators, body men, washers/polishers, car jockeys, porters, tiremen, undercoaters, used car get ready and partsmen, and all lot men employed by us at our Hillside, New Jersey facility, BUT EXCLUDING part time employees, summer help, new and used car salesmen, service writers, office/clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

WE WILL NOT refuse to honor the terms of the collective-bargaining agreement reached with Amalgamated Local 747 on May 12, 1999.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees when they are exercising their rights under Section 7 of the Act.

WE WILL recognize and bargain collectively with Amalgamated Local 747 as the exclusive representative of all the employees in the appropriate unit and WE WILL honor the terms of the collective-bargaining agreement reached with Amalgamated Local 747 on May 12, 1999.

WE WILL make employees whole for any loss of earnings and other benefits ensuing from our unlawful failure to recognize Amalgamated Local 747 and adhere to the collective-bargaining agreement.

WE WILL pay to Amalgamated Local 747 dues which should have been, but were not, deducted from employees' paychecks pursuant to valid dues-checkoff authorizations until the expiration of the May 12, 1999-July 31, 2002 contract, with interest.

ROUTE 22 AUTO SALES D/B/A ROUTE 22 TOYOTA AND ROUTE 22 AUTOMOBILES D/B/A ROUTE 22 HONDA

Robert Gonzalez Esq. and *Marguerite Greenfield Esq.,* for the General Counsel.
Michael T. Scaraggi Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This most unusual case was heard before me in Newark, New Jersey, on August 29, 2000. The charge was filed on February 16, 2000, and the compliant was issued on May 23, 2000. In substance, the complaint alleges that the Respondent recognized and signed a contract with Local 747 on May 12, 2000, and thereafter withdrew recognition from this Union since on or about August 27, 2000.

What is unusual here is that both prior to and after the alleged withdrawal of recognition, the Respondent had also lawfully recognized another labor organization, namely Local 148, International Union of Allied Novelty and Production Workers, AFL–CIO, with whom it asserts that it has a contract. I should note here that neither the charge nor the complaint makes Local 148 a party in interest in this case and there are no allegations in any charge or complaint that (1) the Respondent illegally recognized Local 148, (2) that Respondent illegally entered into a collective-bargaining agreement with that organization and (3) that Local 148 violated the Act by accepting recognition or illegally made a contract with the Respondent. There is, in fact, no allegation that the contract made between Local 148 and Respondent should be set aside even though the effect of the General Counsel's theory would be to negate any representational claim of that labor organization and any contract it has made with the company. Although not served, a business agent of Local 148 did show up at the hearing, but did so without counsel.

In my opinion there is, therefore, a substantial question as to whether the complaint, or more particularly the remedy sought, can succeed because of the procedural failure to put on sufficient notice a necessary party to this proceeding, namely Local 148.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I JURISDICTION

The complaint alleges, the Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It also is concluded that the Charging Party, Amalgamated Local 747 and Local 148, International Union of Allied Novelty and Production Workers are labor organizations within the meaning of Section 2(5) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICES

Local 747 was initially recognized by the Respondent in 1992. At that time a collective-bargaining agreement was executed covering a variety of mechanics, service employees, and body parts employees. That contract ran from August 1, 1992, to July 30, 1995. The president of Local 747 was Edward Bigham Jr. and Local 747, which was an unaffiliated union, represented about 800 employees of about 15 employers.

Sometime in 1995, Bigham made an arrangement with the International Union of Allied Novelty and Production Workers, AFL–CIO to transfer most of Local 747's membership into a newly charted local of the International called Local 911. This arrangement was confirmed by a letter from Miles Nekolny, president of the International Union on February 14, 1995. The letter reads as follows:

> This letter will serve as a confirmation of our conversation in Florida regarding your concerns of the affiliation of Local 747 with the International Union of Allied Novelty and Production Workers, AFL–CIO.
>
> During the first 5 years of our affiliation agreement, Amalgamated Local 747 may conduct a vote of it membership to terminate the above referenced agreement.
>
> Such determination shall be by a majority vote of its membership, which authorized this agreement on behalf of Local 747.
>
> At any time during the first 5 years of this agreement, the International. . . . Shall have the right to terminate this agreement.

In or about March 1995, employees of all the shops under contract with 747 except for one, elected to transfer their membership to the newly formed Local 911. The president of 911 was Bigham and he severed his formal relationship with Local 747.

Despite the change, Bigham testified that Local 747 did not entirely disappear and that it continued to exist to represent the employees of the one shop whose employees had elected not to transfer. Local 747 and Local 911 occupied the same building and the officers of Local 747 were two relatives of Bigham, one of whom was his mother. Bigham testified that he helped out Local 747 as a volunteer.

On October 25, 1995, a collective-bargaining agreement was executed between the Respondent and the newly created Local 911. This contract was retroactive to August 1, 1995, and ran until July 30, 1998. The document was signed by Bigham on behalf of Local 911 and by Ignazio Giuffre on behalf of the company. For some unknown reason, the company remitted checks for union dues made out to Local 747, but these were endorsed over to Local 911 and deposited.

At or about the same time, Local 911 entered into a series of collective-bargaining agreement with other companies whose employees used to be represented by Local 747 except for the one exception noted above.

According to Bigham, some time in 1997, Local 911 merged with Local 148, another and somewhat larger local of the same International Union. This merger was approved by the International Union's executive Board. Local 148's president, Joseph Nardone, remained in that office and Bigham became the Secretary Treasurer. I assume, but no evidence was presented, to show that this merger was carried out by some sort of vote of the respective unions' memberships. In any event, after the merger, the Respondent did not raise any questions about the merger and continued to apply the terms of the contract that it had made with Local 911.

In the summer of 1998, Local 148 entered into negotiations with the Respondent. According to Bigham, he represented the Union and essentially reached the terms of a new contract in

[1] See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

August 1998, with Giuffre. At the time of the agreement, Bigham was employed by Local 148 and was acting as its agent. The terms and conditions of that agreement were put into effect by the Respondent in September 1998, even though the parties had not yet put the agreement in writing and had yet to conclude certain language regarding a severance fund and a pension provision.

On November 18, 1998, Bigham sent a copy of a proposed collective-bargaining agreement to the company. This agreement, by its terms, was to be in effect from August 1, 1998, until July 30, 2001. The parties listed are the Respondent and Local 148. Nevertheless, in the second paragraph of the proffered contract, the agreement states:

> If the Union should disaffiliate from the Allied, Novelty & Production workers Union, AFL-CIO, the employer will continue to recognize the successor labor organization to the extent permitted by law, and this Agreement shall continue in full force and effect, and shall be biding upon the Employer and the successor Labor Organization.

Bigham testified that in the spring of 1999, he decided to disaffiliate from Local 148 because of differences he had with Nardone;

According to Bigham, on or about April 19, 1999, on the letterhead of Amalgamated Local 747, he sent letters to employees of the shops which had previously been covered by contracts with Local 911 and its predecessor, Local 747. These letters stated in substance;

> This is to inform all former Local 747 members who are affiliated with the International Union of Allied Novelty & Production Workers, Local 148 that on [specified date, time and location in early May, 1999] … a vote will be taken to disaffiliate with the IUAN&PW, Local 148 and be known as Local 747. Such disaffiliation will enable all former Local 747 members to regain that identity and all privileges and contract benefits will remain intact.
>
> There will be a question and answer period of half hour before the vote.
>
> . . . . .
>
> If you have any questions, you can reach me direct at 800-522-6606.

The actual ballot was not put into evidence and therefore I do not know the precise question or questions that the employees voted on. Although I assume that one question was whether to disaffiliate from Local 148, I do not know if there was a separate question as to whether the voters wanted to affiliate with Local 747. This would, in my opinion, have some significance because at this time, Local 747 was essentially a stranger to the employees of the Respondent, not having represented them for at least 3 years. And to the extent that Local 747 was still alive, it existed as a small independent organization representing perhaps 70 or 80 people of one employer.

According to Bigham, employees of the Respondent voted unanimously in favor of disaffiliation. At other shops, large majorities also voted in favor of the "disaffiliation." As noted above, I can not say with any certainty that the employees at the same time voted to affiliate with Local 747 which, at the time, was an independent union having long lost any connection to the employees who voted.

Bigham did not give any *written* notice of these elections to Local 148 or to the International Union and there were no representatives of those organizations who either spoke to or otherwise communicated with the employees involved before the votes were taken.

I also note that although the original agreement between Bigham and the International Union permitted either party to opt out within 5 years, there is no evidence that such agreement was known to or accepted by employers who might be affected.

On May 11, 1999, Bigham representing himself to be an agent of Amalgamated Local 747, wrote to the company and stated:

> This is to inform you that the former members of Local 747 have voted to disaffiliate with the International Union of Allied Novelty and Production workers Union, Local 148, AFL–CIO. Therefore the membership will revert back to Amalgamated Local 747.
>
> All dues, initiation fees and correspondence should be made out to Amalgamated Local 747 and be forwarded to the above address. We are going to remain in the Production Workers Union, Local 148 Pension Fund. Please continue to remit the pension monies to the Production workers Union, Local 148 Pension Fund.
>
> There will be no changes in the dues and initiation fees.
>
> Please notify your bookkeepers immediately of this change.[2]

According to Bigham, on May 12, 1999, Giuffre signed a newly proffered agreement on behalf of the Respondent that now listed Local 747, instead of Local 148, as a party to the contract. This agreement is substantively the same as the agreement that he had previously proffered back on November 18, 1998, when Bigham did so on behalf of Local 148.

As of May 12, 1999, Bigham was still an officer and employee of Local 148 and he did not officially resign from that organization until June 1999.

Although Bigham tried to get the other employers, where votes had been taken, to sign agreements with Local 747, they all refused. Presumably they continued to honor their agreements with Local 148.

In the meantime, and stepping back for a moment, the International Union instituted a law suit in the United States District Court for the District of New Jersey to compel the imposition of a trusteeship on Local 148. On July 19, 1999, the court entered a Consent Order placing the Local in trusteeship and at paragraph 4, stated: "It is understood and agreed that all employees presently covered by collective-bargaining agreements with Locals 747 or 911 should be members of Local 148 and shall be transferred to Local 148 forthwith." Bigham, as an officer of Local 148 was aware of this proceeding and he and Nardone were present at various times in court. It is also true that neither the Respondent nor the old Local 747 were parties to this lawsuit, albeit none of the employees affected by the suit had been represented by what remained of Local 747 for at least 3 years.

Notwithstanding the execution of the agreement with Local 747 on May 12, 1999, the Respondent failed to remit any dues.

[2] I would assume that similar letters were sent to other employers where votes were taken.

When Bigham called to inquire about this, he was told either by Giuffre, or the company's bookkeeper, that they would take care of it. However, no dues were forthcoming and Bigham soon began to realize that something was wrong.

On August 9, 1999, Bigham sent a letter to the Respondent which stated, in pertinent part;

> As you have been notified, this union represents the employees at your facility. Local 747 was certified by the National labor Relations Board as the exclusive bargaining agent for the workers at your facility. [3] Since then, this union has affiliated with the International Union of Allied Novelty & Production Workers with a five year escape clause. As we previously informed you, the members of this Local have chosen to exercise their contractual right to disaffiliate with this International. In May of this year, the membership voted with an overwhelming majority of ninety percent in favor of disaffiliation.
>
> In light of this information, we had requested that you forward all dues and initiation fees to Local 747. Having been threatened by the Production Workers Union, Local 148, that you will incur legal fees if you comply with our request, your company has not done so.
>
> We are now discussing this issue with the International Union to try to resolve this before pursuing it through the legal system.
>
> Therefore, we are now suggesting that you do not deal with any union until this matter is resolved. We are also strongly recommending that you hold all contributions in escrow, except medical and dental contributions.[4] Do not remit dues, initiation fees or pension contributions to any union. If you need to meet with a union representative we would suggest that you have a representative from both unions present to resolve any grievances or contractual disputes.

On August 19, 1999, the company's attorney, Salvatore A. Giampiccolo, wrote to Nardone of Local 148 with a copy to Bigham. This read in pertinent part:

> We are aware of the on-going dispute and litigation regarding the Unions, as well as the indemnification and abstract of the Consent Order entered by the U.S. District Court . . . . on July 20, 1999. However, the Dealership is uncomfortable in the position it has been placed in by the two Unions. Unless same is resolved and a Court Order is issued directly to the Dealerships to release the funds to the Union, the Dealership will escrow all funds to protect the employees' interests in a specific account.
>
> In addition, please be advised that Mr. Bigham has made several appearances at the Dealership regarding the Union Agreements and employees' dues. It is apparent that Mr. Bigham is attempting to persuade employees of the Dealership to honor the Union Agreement with Amalgamated 747. Therefore, unless the above is resolved, the escrow will not be released to any of the Unions.

Subsequently, the company hired labor counsel Michael T. Scaraggi. Scaraggi, by letter dated August 27, 1999, advised Attorney Giampiccollo and Local 148, that the company should continue to recognize Local 148 and that in light of the July 1999 Consent Decree, the company should not remit any monies to Local 747. He also advised them that Bigham should be barred from the company's premises.

By letter dated August 30, 1999, Giampiccolo replied to the effect that the company would forward all moneys and dues to Local 148 and that he was in receipt of an Indemnity Agreement from Local 148.

By letter dated November 1, 1999, Bigham wrote to company president, Giuffre, stating that he was continuing his request that the company recognize Local 747 and that in accordance with Section 2 of the May 12 contract, the company should remit all dues and correspondence to Local 747. Bigham noted that failure to comply would result in an unfair labor practice charge being filed.

On November 19, 1999, a representative of Local 148 executed a collective-bargaining agreement with Respondent which was also signed by the company on January 7, 2000.

Notwithstanding Bigham's letter of November 1, 1999 described above, the company did not file an unfair labor practice charge against itself or against Local 747 claiming that either or both violated Section 8(a)(2) or 8(b)(1)(A) by virtue of the granting of recognition to Local 747 in May 1999. Nor did the International Union or Local 148 file any charges attacking that recognition, no doubt believing that since the company, within 3 months, had changed course by withdrawing recognition from Local 747, there was nothing to complain about; that whatever recognition that might have been accorded to Local 747 had been remedied by self help and that there did not exist any longer any reason to file any unfair labor practice charges.

III. ANALYSIS

To summarize: The company initially recognized Local 747 in 1992 when it was an independent union. It then recognized Local 911, International Union of Allied Novelty and Production Workers, AFL–CIO in 1995 when a vote was taken in 1995, pursuant to which most, but not all of Local 747's members, voted to transfer their membership to the newly charted Local 911. (At the same time the employees of the one employer who voted not to transfer, remained in Local 747 which was essentially run by Bigham's mother with his assistance). Thereafter, in 1997, Local 911 went out of existence when it merged into Local 148. Bigham continued to represent the employees from the shops which he had represented in the past, either as Local 747 or 911. In the summer of 1998, Bigham as a Local 148 representative, made a collective-bargaining agreement with the company which was implemented in September 1998, before it was put into writing. The written contract, when it was proffered by Bigham, had Local 148 listed as the union. At some point in 1998 or 1999, the International Union filed a lawsuit in Federal District Court seeking to impose a trusteeship on Local 148. (Nardone and Bigham were involved in that lawsuit). At or about the same time and for reasons unknown to me, Nardone and Bigham had a falling out and Bigham decided that it would be a good idea for the employees in shops he had previously represented to "disaffiliate" from Local 148 and its International Union. (At the time of the original transfer of membership from 747 the International's President had advised Bigham that he would have the right to

[3] That is an inaccurate statement inasmuch as the Board never certified Local 747 as the exclusive bargaining representative of the employees of the Respondent.

[4] Under either the proposed contract from Local 148 or the May 12 signed contract with Local 747, the Respondent is responsible for independently obtaining and paying for health insurance for its employees.

disaffiliate within 5 years). In 1999, an election was held in the shops where employees had previously been represented by Local 747 and Local 911 and they voted to disaffiliate. Representatives of Local 148 and the International did not communicate with employees about this matter. After the vote was taken, Bigham tried, without success, to get most of the employers to recognize Local 747 as the new representative. However, at the Respondent, Bigham did manage to convince the owner to sign a contract. (Substantively the same agreement as had been reached with Local 148). Nevertheless, as Local 148 apparently threatened to sue the company, the Respondent essentially retracted its recognition of Local 747 and decided to continue to recognize Local 148 as the exclusive collective-bargaining representative.

That is essentially where matters stood at the time of this hearing. There were two separate labor organizations each claiming to represent the employees of the company, and each having obtained, at different times, recognition and collective-bargaining agreements from the company. The last recipient of such recognition and a signed contract was Local 148.

The question here is whether the Respondent has an obligation to recognize and bargain with one of two unions, both of whom have claims of representation. The General Counsel asserts that despite Local 148's representational claim, Local 747's claim has precedence because even though a new contract was made between the company and Local 148 (at the conclusion of Local 148's previous contract), some, (but probably a minority), of Local 148's membership voted to disaffiliate from Local 148 (and perhaps to affiliate with Local 747), after which for a brief moment, the company agreed to recognize and bargain with Bigham, not as the representative of Local 148, but rather as the representative of Local 747.

Clearly, as Local 148 was, at the time of the election run by Bigham, the incumbent and lawfully recognized collective-bargaining-representative, it had a continuing and substantial claim to represent the employees of the Respondent. Its rights cannot, in my opinion, simply be overridden or ignored by a competing claim by a rival labor organization. Thus, even if Local 747, as a rival union, had some legitimate basis for claiming that it and not Local 148, represented a majority of the Respondent's employees, and even if Local 148's contract would not have served to act as a contract bar, (because not reduced to an executed writing), the employer would not be free to choose to recognize and bargain with the nonincumbent union. *RCA del Caribe,* 262 NLRB 963 (1982). This is because the incumbent Union, (Local 148), would continue to have a legally recognized presumption of majority status until that presumption was defeated either by a Board conducted election or by an unequivocal demonstration of proof made to the employer that the employees no longer wanted to be represented by the incumbent labor organization. *Maramont Corp*., 317 NLRB 1035 (1995).

The facts in this case do not convince me that Local 747's claim for recognition is so strong that it should defeat the claim of the incumbent, Local 148, and require the employer to bargain with it rather than Local 148 in the absence of a proper election to determine the outstanding question concerning representation.

As noted above, Local 148 continued to exist and claim representation after its 1995–1998 contract ended and after, Bigham, on Local 148's behalf, negotiated a new 3 year contract between the employer and Local 148. Moreover, unlike the typical case where a vote is taken by an incumbent union to merge or affiliate into another labor organization, this "disaffiliation" vote did not result in the dissolution of Local 148, which continued to exist and continued to assert in unequivocal terms, including a threatened law suit, its claim to represent these employees.[5] Finally, the evidence is not particularly clear that the employees, even if they voted to disaffiliate from Local 148, also voted to affiliate with Local 747 which, at the time, was a separate labor organization. I do not conclude that a vote to disaffiliate from Local 148 automatically constituted a vote to affiliate with Local 747.

The General Counsel seems to argue that because the Respondent, in May 1999, for a fleeting moment, orally agreed to bargain with Local 747, this trumps every other consideration and is sufficient to resolve the case in Local 747's favor. In light of all the evidence, I do not think that this is or should be the case. And given the fact that we have here two competing claims for representation, I think that the matter should properly be resolved through the Board's election process.

CONCLUSIONS OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 24, 2000

[5] Cases involving successor unions created as a result of affiliation or merger votes would include *United Mine Worker, Local 5741 v. NLRB*, 130 LRRM 2273 (6th Cir. 1989); *CPS*, 324 NLRB 1018 (1997); *Sullivan Bros.*, 317 NLRB 561 (1995); *Control Services,* 303 NLRB 481, 492 (1991).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.